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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 93-36
Tariff Filing Requirements for	)	
Nondominant Common Carriers	)	

COMMENTS

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SUMMARY

MCI supports the Commission's proposal to reduce to one day the notice period for tariffs filed by non-dominant carriers. In addition, MCI supports the proposition that non-dominant carriers need file only "maximum rates" or "ranges of rates" in their tariffs, and it strongly supports removing all tariffing requirements that burden carriers which, by definition, are incapable of harming either consumers or competition.

The unfortunate demise of the Commission's long-standing "forbearance rule" renders it essential that the Commission act quickly to expand tariff "streamlining." Just as streamlining has been extended during the past four years to carriers classified and regulated as dominant, so it now must be expanded once again for non-dominant carriers, in recognition of the clear distinctions existing between them and carriers that must continue to remain subject to more detailed tariff regulation.

The public interest will be served by prompt adoption of the proposed rule changes because the development of robust competition in the interexchange marketplace can be better assured. If the proposed rule modifications are not adopted, then competition will suffer as a result of the application to non-dominant carriers of regulatory requirements intended to apply only to carriers possessing market power.

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COMMENTS

MCI Telecommunications Corporation (MCI) hereby submits its Comments in support of the Commission's proposals in its Notice of Proposed Rulemaking, FCC 93-103, released February 19, 1993, (NPRM) to further streamline the tariff filing requirements applicable to non-dominant carriers.[1/] The Commission has substantial public interest and statutory grounds, in the absence of its permissive tariffing policy,[2/] to undertake at this time to align its tariffing requirements for non-dominant carriers with its current perception of what is best for the further development of a robust and healthy competitive interexchange marketplace.

[1/] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1979); Second Report and Order, 91 FCC 2d 59 (1982)(Competitive Carrier).

[2/] In AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), the Court vacated the Commission's so-called "forbearance rule" described by the Commission in the NPRM (¶ 9, n. 20) as "a cornerstone of the Commission's regulatory regime ever since [its] adoption." See Competitive Carrier, 95 FCC 554 (1983). MCI intends to appeal this decision to the U.S. Supreme Court and expects to be joined in that endeavor by the Commission and others.

I. THE COMMISSION'S STREAMLINED REGULATION PROPOSALS WILL FURTHER THE PUBLIC INTEREST

The Commission is proposing to refine its tariffing notice, content, and form rules governing non-dominant carriers, which rules were adopted more than twelve years ago. In view of the absence of market power in non-dominant carriers, and thus their inability to engage in unjust and unreasonable marketplace practices, the current, more rigorous tariffing rules tend to impose unnecessary and unreasonable burdens on those carriers. As a result, dominant carriers are advantaged and competition suffers. In a word, the existing non-dominant carrier tariff-

that would permit non-dominant carriers to: (1) file tariffs and tariff updates on three and one-half inch diskettes; (2) indicate new and changed tariff material on a flexible basis; (3) submit covering letters that explain tariff filings on a much [illegible] formal basis that currently is required; and (4) state in

that policy in light of the fact that its forbearance rule currently is not operative and, therefore, non-dominant carriers must file tariffs. After more than a decade of experience with streamlined regulation, the Commission tentatively concluded that "existing tariff regulation of nondominant carriers inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends."[6/] The Commission decided that "some of our existing streamlined tariff filing requirements are unnecessary for, and burdensome on, nondominant carriers" and it therefore proposed to ease those requirements.[7/]

It is noteworthy that, since the Commission originally promulgated its streamlined tariffing approach for non-dominant carriers, no party has ever formally challenged the statutory and public interest premises underlying thay approach. Thus, no party has ever challenged the Commission's rationale for permitting non-dominant carriers to file tariffs on abbreviated notice, without cost support, and with the presumption of lawfulness predicated on non-dominant carriers' lack of market

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[6/] ID at ¶ 12.

[7/] Id.

power.[1] That same rationale justifies the proposed refinements to its approach as reflected in the NPRM.

One Day Notice

There can be no question that the public interest in the prompt availability of new services and rates would be served if non-dominant carriers were permitted to effectuate tariff changes more rapidly than is possible today. No legitimate interests of any other party would be injured if non-dominant carriers had that flexibility since their tariffs are entirely noncontroversial. As the Commission notes, it has never suspended a non-dominant carrier's tariff and has rejected such a tariff on only one occasion.[2] In any event, if any party

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[1] AT&T, of course, has whined over the years about the Commission's streamlining approach in the courts of public opinion (rather than real courts) by employing such public-relations catch-phrases as "asymmetric regulation" and "unlevel playing field." However, its strategy has been to obtain streamlining for itself rather than to cause its non-availability to others.

The same also was true of AT&T's approach toward the forbearance rule, which it actively supported when it did not wish to file tariffs for its resale affiliate's offerings. However, unlike with regard to tariff streamlining (which continually has been extended to AT&T over the years), AT&T came to realize little likelihood of its receiving the right to transact in the telecommunications marketplace other than by tariff in the near-term future so it set out to undermine that rule. See Letter from Francine J. Berry, AT&T, to Donna R. Searcy, FCC, dated August 7, 1989.

[2] NPRM at ¶ 14, citing Capital Network Systems, Inc., Tariff FCC No. 2, Memorandum Opinion and Order, 6 FCC Rcd 5609 (Com.Car.Bur. 1991). The reason for the rejection here was that the carrier, according to the Bureau, was attempting to apply its tariff to an entity -- AT&T -- that was not really a "customer" of its service. This one instance of rejection hardly would support a proposition that non-dominant carriers are likely to inflict harm on consumers in the marketplace.

believed itself aggrieved by a non-dominant carrier after its tariff became effective, that party could seek rejection of the tariff or it could avail itself of the Commission's complaint processes pursuant to Section 208 of the Communications Act.[10/]

Tariff "Form"

The Commission's tariff form proposal is similarly sensible and beyond legal challenge. The original purpose of the tariff form rules, Sections 61.52 and 61.54, was to allow the Commission to "stringently review" the practices of dominant carriers. However, it clearly is unnecessary to require non-dominant carriers to adhere to those same requirements when their tariffs "do not require stringent review," are presumed lawful, and are rarely challenged; and those carriers cannot rationally engage in conduct that violates Sections 201(b) and 202(a) of the Communications Act.[11/] Accordingly, the Commission correctly concludes that its current tariff form requirements as applied to

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[10/] The Commission believes itself capable of taking appropriate action against tariffs after they have been allowed to take effect. See "Notice of Proposed Rulemaking," Competition in the Interstate Interexchange Marketplace," FCC 90-90, released April 13, 1990, at Para. 118. ("[The Commission] is fully empowered...to initiate investigations after a tariff becomes effective and to order any necessary prospective relief.") See, also, Section 403 of the Communications Act.

The Commission's authority to deal remedially with tariffs allowed to take effect currently is before the Commission on review. See Order, In the Matter of Mountain States Telephone and Telegraph Co., et al., Revisions to Tariff FCC No 1 To Establish Rates and Regulations for Public Packet Switching Service, Transmittal No. 30, DA 90-205, rel. February 14, 1990.

[11/] See NPRM at ¶ 24.

non-dominant carriers are "unnecessary" and should be modified.[12/]

Since the act of filing tariffs at all has only been made necessary by the Court's interpretation of Section 203(a) of the Act in AT&T v. FCC, supra, it is entirely reasonable to accord non-dominant carriers substantial flexibility and wide latitude in making those pedestrian filings. Allowing non-dominant carriers to file tariffs on computer diskettes rather than printed pages, affording them flexibility in indicating new and changed material, and permitting them to file a simple cover letter instead of a formal transmittal letter are reasonable means of complying with the current obligation to file tariffs, especially since these approaches will result in the imposition of a lesser burden and expense than otherwise would arise. No legitimate public interest purpose would be served by subjecting these carriers to rigid specifications under the current tariffing format.

Pricing Detail

Finally, the Commission appropriately decided to relax its requirements concerning rate information that non-dominant carriers need to provide in their tariffs. As the Commission acknowledged, "[c]urrently, [those] carriers are required to prepare and file new schedules each time they wish to implement minor rate revisions. This requirement forces non-dominant carriers to make repeated revisions, with attendant

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[12/] Id. ¶ 25.

administrative costs."[13] In view of that unchallengeable finding, the Commission concluded that "existing tariff filing requirements are unnecessary for, and burdensome on, nondominant carriers in the absence of permissive tariffing." The Commission therefore "propose[d] to allow nondominant carriers to state in their tariffs either a maximum rate or a range of rates."[14] Provided that non-dominant carriers satisfied those benchmarks by conducting their business operations within them, they could adjust their rates to meet marketplace conditions without filing new tariffs each time they did so. Certainly, affected customers, the Commission correctly reasoned, "would obtain exact rate information from the carriers in the course of ordering service."[15]

Given the demands placed on non-dominant carriers to respond rapidly to the various pricing gimmickry, promotions, contract-tariffs and other discriminatory pricing plans that AT&T is constantly introducing, there clearly is a powerful public interest rationale for according non-dominant carriers the pricing flexibility and resulting advantages that the Commission's proposal would allow.[16] Since non-dominant

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[13] Id at ¶ 22.

[14] Id.

[15] Id at n. 41.

[16] AT&T is behaving in a manner to be expected of a dominant carrier seeking to at least retain its substantial market share in the face of growing competition: it is introducing a virtually unlimited number of service "options" --

(continued...)

carriers' tariffs would be presumed lawful and, under the Commission's instant proposal, could be introduced on one day's notice, no purpose would be served by requiring those carriers to make recurring tariff filings for periodic and minor rate changes.

II. THE COMMISSION HAS THE AUTHORITY UNDER THE COMMUNICATIONS ACT TO ADOPT ITS TARIFF NOTICE, FORM AND CONTENT PROPOSALS

The Commission's proposals to refine its streamlined regulation rules are fully authorized by Sections 203(a), 203(b) and 4(i) of the Communications Act. It is well established that the Commission has expansive powers to modify its regulatory policies as marketplace conditions and public interest requirements change,[17] and it is entirely appropriate that the Commission exercise those powers in the manner it is proposing here.

Section 203(a) of the Act provides that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations

. ." 47 U.S.C. § 203(a). Section 203(b)(2) of the Act expressly provides that "[t]he Commission may, in its discretion and for good cause shown, modify any requirement" of Section 203(a), except that it may not require the tariff notice period of Section 203(b)(1) to exceed 120 days. 47 U.S.C. § 203(b)(2).

Pursuant to Section 203, the Commission adopted Sections 61.52 and 61.54 concerning the form and composition of carrier tariffs and Section 61.58(b) concerning the notice requirements applicable to non-dominant carriers' tariffs. The Commission's instant proposals to modify those requirements are fully in accordance with Section 203(a) and Section 203(b) of the Act, as interpreted by the courts.

In American Telephone and Telegraph Co. v. FCC, 503 F.2d 612 (2d Cir. 1974) (hereinafter, Enlarged Notice), the Court affirmed the Commission's authority under Section 203 to "modify" from 30 to 60 days the requisite notice requirement for tariffed rate increases. The Court rejected AT&T's contention that the provision only authorized the Commission to reduce, but not enlarge, the notice period. In the Court's view, the Commission's authority to "modify" plainly "means to alter or to change . . . irrespective of any quantitative result." Id. at 617. The Court also examined the legislative history of the Communications Act for guidance in interpreting the meaning of the term "modify" in Section 203(b). It concluded that the Commission's authority was not co-extensive with the Interstate Commerce Commission's (ICC's) more combined authority to modify

the tariff filing obligations of its regulatees. The Court concluded that it is "clear that the congressional intent was not to provide a carbon copy of the Interstate Commerce Act." Id. at 616. Accordingly, the Court rejected AT&T's argument that Section 203 confers no greater powers on the Commission than the tariff related powers granted to the ICC under Section 6(3) of the Interstate Commerce Act. 49 U.S.C. § 6(3). Id. at 617.

In the Court's view, its conclusion was consistent with its previous interpretation of Section 203 as set forth in American Telephone and Telegraph Co. v. FCC, 487 F.2d 864 (2d Cir. 1973) (hereinafter, Special Permission). In Special Permission, the Court reversed a Commission decision that required AT&T to obtain "special permission" to file tariff rate changes on the ground that this result constituted an unlawful prescription of rates and improperly circumvented the carrier-initiated tariff filing scheme of the Act. Notably, the Court stated that "under Section 203(b) the Commission may only modify the requirements as to the form of, and information contained in, tariffs and the thirty days notice provision." Id. at 879. In the NPRM, the Commission is proposing to modify just those requirements.

Unlike the Commission's mandatory forbearance rule, which was reversed in MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985), the Commission's instant proposals do not contemplate the "wholesale abandonment or elimination of a requirement" set forth in Section 203 of the Act. Indeed, the Commission is not proposing to abandon any requirements established in the Act; it is merely

seeking to change requirements governing the filing of tariffs by non-dominant carriers.

First, the Enlarged Notice and Special Permission decisions confirm that the Commission has authority under Section 203(b) to "modify" the tariff notice requirement of Section 203(b) and as implemented by Section 61.58 of its Rules. In Competitive Carrier, the Commission exercised this authority by adopting the 14-day tariff notice provision of Section 61.58(b) of its Rules for non-dominant carriers. The same grant of authority justifies the Commission's proposal to reduce that notice period now to one day.[18/]

Under the circumstances, a reduction of the notice period for non-dominant carriers would not result in abandonment of the Commission's statutory obligation to enforce the Communications Act. Non-dominant carriers would continue to provide notice before their tariffs became effective although, as the Commission acknowledges, the one-day notice period would essentially preclude pre-effective tariff review.[19/] However, it is arguable that the Commission is under no statutory obligation to conduct

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[18/] Indeed, such an abbreviated notice period would not be unprecedented: the Commission often waives its tariff notice rules for both dominant and non-dominant carriers to allow them to make tariff changes effective on less than the notice period prescribed in the rules. Indeed, the Bureau -- quite improperly -- has granted AT&T a "continuing waiver" to file all its promotions on less than the period of time prescribed in the general rule. See AT&T "Application for Special Permission," No. 1527 and Special Permission 93-87. This clearly is inappropriate as a matter of law.

[19/] See NPRM at ¶ 14.

such review. As Special Permission teaches, a carrier does not need the Commission's approval to file or implement a tariff. 487 F.2d at 879-81.

Indeed, the Commission does not now conduct pre-effective review of non-dominant carrier tariff proposals because those tariffs are presumed lawful, do not require cost justification and, therefore, have rarely even been protested, much less successfully.[20] Thus, further contracting the notice period would not appear to have the effect of "eliminating" any pre-effective tariff review, nor would it place the Commission in a position of ignoring the requirements of the Communications Act. In any event, the Commission, as noted above, is fully capable of reviewing a tariff for legal sufficiency -- and taking any required action following its review -- after a tariff has become effective.

Second, as noted, Section 203(a) of the Act provides that the Commission "may by regulation require" carriers to specify information concerning their schedules of charges. The Commission has delineated requirements concerning the form in which tariff information must be presented in Sections 61.52 and 61.54 of its Rules, including information relating to new and changed matter. The Commission obviously has ample authority under that provision to modify those requirements in order to make them suitable to circumstances affecting non-dominant

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[20] Id. Even AT&T tariffs filed in connection with its Price Cap "Basket 3" services enjoy similar status.

carriers. Any other view would place such rigid boundaries on the Commission's authority that it would be paralyzed from acting in the best interests of the evolving public interest in increasing competition in the interexchange marketplace.

Third, under Sections 203(a) and 203(b) of the Act, and in accordance with the Special Permission and Enlarged Notice decisions, the Commission clearly has authority to allow non-dominant carriers to file maximum rates or rate ranges.[21/] Section 203(a) only requires that carriers file "schedules" of their charges: it does not specify the form in which that information must be presented. Historically, given dominant carriers' significant market power and ability to violate Sections 201(b) and 202(a) of the Act, the Commission has required that the tariff "schedules" of dominant carriers contain detailed rate information. Since non-dominant carriers cannot rationally engage in unlawful marketplace practices, there is no need to require that they file the detail required in the tariff "schedules" of dominant carriers. Simply stated, dominant and non-dominant carriers are not "similarly situated" and, therefore, there is no legal or public policy basis to require that they be similarly treated in terms of the pricing detail furnished in their tariffs. Accordingly, the Commission has "good cause" to "modify" the requirement of Section 203(a) concerning the composition of the rate "schedules" of non-dominant carriers.

[21/] Id at ¶ 22.

As the Court in Special Permission observed, the Commission has authority to "modify requirements as to the . . . information contained in tariffs." 487 F.2d at 879. And that is precisely what the Commission is proposing to do in the NPRM. Moreover, in authorizing non-dominant carriers to file maximum rates or ranges of rates, the Commission is not undertaking to circumvent any limitations on its authority as it unsuccessfully sought to do in requiring AT&T to seek special permission before filing tariffs. Carriers would still be required to file "schedules" of their rates, as required by Section 203(a) of the Act.

The Commission's proposal, therefore, does not constitute the wholesale abandonment or elimination of the tariff filing requirement. Non-dominant carriers simply would be required to specify either the maximum rates a customer must pay or a range of rates. Either requirement would comply with the Act and would satisfy the information needs of customers, the Commission and, in proper context, their competitors as well. Since non-dominant carriers are incapable of charging predatory or unreasonably discriminatory rates, requiring them to provide the detailed tariff information the Commission requires of dominant carriers would serve no legitimate regulatory or business interest.

Although the ICC does not permit motor vehicle carriers to file tariffs containing ranges of rates,[22] that agency's policy is not dispositive with regard to the scope of this Commission's

[22] See, e.g., Practices Common Carriers Conference v. United States

authority. As the Court observed in Enlarged Notice, in enacting Section 203(b) of the Communications Act, "the congressional intent was not to provide a carbon copy of the Interstate Commerce Act."[23] Indeed, the Commission's authority under Section 203(b) to modify tariffing requirements is indeed greater than the analogous power vested in the ICC.[24]

Section 4(i) of the Communications Act, which authorizes the Commission to "make such rules and regulations, and issue such orders, not inconsistent with . . . [the Act], as may be necessary in the execution of its functions," 47 U.S.C. § 154(i), provides still additional statutory support for the instant proposals. Pursuant to Section 4(i), the Commission has significantly changed the utility and role of tariffs in the regulatory process.[25] The Commission's modest proposals to expand upon its streamlined regulation approach for non-dominant carriers are no less "necessary" to the execution of its functions and the mandate of Section 1 of the Communications Act than are the far more drastic reductions in regulation that the

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[23] 503 F.2d at 616.

[24] Id at 617.

[25] In replacing rate-of-return with price cap regulation, the Commission has drastically diminished the value of tariffs for individual services. Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873 (1989), 5 FCC Rcd 6786 (1990). Moreover, pursuant to Section 4(i), the Commission even allows AT&T to offer services to business customers under "individually negotiated contracts." See AT&T Communications, 4 FCC Rcd 4932 (1989), vacated and remanded sub nom. MCI v. FCC, 917 F.2d 30 (D.C. Cir. 1990), remand AT&T Communications, 6 FCC Rcd 640 (1991); Interexchange Competition, 5 FCC Rcd 5880 et seq., supra.

[redacted]